Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of	)	
	)	
Amendment of Parts 1, 21, 73, 74 and 101 of the	)	WT Docket No. 03-66
Commission=s Rules to Facilitate the Provision of	)	RM-10586
Fixed and Mobile Broadband Access, Educational	)	
and Other Advanced Services in the 2150-2162	)	
and 2500-2690 MHz Bands	)	
	)	
Part 1 of the Commission's Rules – Further	)	WT Docket No. 03-67
Competitive Bidding Procedures	)	
	)	
Amendment of Parts 21 and 74 to Enable	)	MM Docket No. 97-217
Multipoint Distribution Service and the	)	
Instructional Television Fixed Service	)	
Amendment of Parts 21 and 74 to Engage in Fixed	)	
Two-Way Transmissions	)	
	)	
Amendment of Parts 21 and 74	)	WT Docket No. 02-68
of the Commission's Rules with Regard to	)	RM-9718
Licensing in the Multipoint	)	
Distribution Service and in the	)	
Instruction Television Fixed Service for the	)	
Gulf of Mexico	)	

To: The Commission

COMMENTS OF THE INDEPENDENT MMDS LICENSEE COALITION

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SUMMARY

The Independent MMDS Licensee Coalition (IMLC) is a group of small independent MMDS licensees. The Comments submitted here urge the Commission to re-structure the ITFS/MMDS band along the lines proposed by the Wireless Coalition, with certain key improvements. The highlights of the Comments are:

1. The band should be de-interleaved and height/power levels adjusted to permit cellular low power operations along with limited high power operations. Some MDS spectrum should be included in both the upper and lower bands to facilitate the provision of FDD service.

2. Outdated and unnecessary reports and requirements for MDS licensees should be abolished.

3. The Protected Service Area/Geographic Service Area of incumbents should be clearly defined. While splitting the football is acceptable as a way of establishing clear protected service areas, licensees should also be permitted to reach voluntary agreements with adjacent co-channel licensees to establish PSAs in overlapping areas which reflect their own needs.

4. Voluntary communities of interest among ITFS and MDS licensees in each market could be permitted. Within these communities of interest, licensees could operate without the need for interference protection among themselves. Licensees participating in such communities would receive contiguous spectrum to facilitate usage.

5. A transition plan should provide for a graduated transition from large markets to small markets on an FCC-prescribed schedule. A majority in interest in each market could advance or defer the transition date. All licensees should be responsible for their own transition expenses.

6. All vacant and licensed MDS licenses would be auctioned in a single two-sided auction. Incumbents could bid with virtual dollars to retain their licenses, but if they are outbid they would receive the bid amount and forfeit their license. Any licensees retaining their licenses would be grouped together in the band to make more useful bandwidth available to the auction winner. This method allows prospective users of the spectrum the best and quickest method of getting clear title to a large swath of unencumbered spectrum.

7. Section 21.303 of the rules should be abolished in favor of simply requiring substantial service by licensees during the course of their license term, as contemplated by the more modern regulatory model.

8. MDS leases should be required to permit recovery of transmitter facilities in the event of termination of the license so as to prevent the possibility of service interruption. MDS lessors and lessees should be required to negotiate in good faith to conform their existing leases to the new rules.

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COMMENTS OF THE
INDEPENDENT MMDS LICENSEE COALITION

The instant proceeding represents an enormous opportunity for MMDS licensees to be able to realize, at long last, the true potential of this valuable spectrum. The Independent MMDS Licensee Coalition ("IMLC") is a group of independent, smaller MDS and MMDS licensees who hold licenses in virtually every region of the United States and its territories. The IMLC is a subset of literally hundreds of such licensees around the United States including licensees who

acquired MMDS licenses in lotteries and who plan to be operators under the new rules. This group makes up the vast majority of MDS licensees in the country, although to date they have been a relatively silent majority.

The present rulemaking was initiated at the behest of ITFS operators, the Catholic Television Network, and the Wireless Communications Association International ("Wireless Coalition"). While this initiative was useful and valuable, it is important to recognize that there are other voices within the wireless communications community. The educational community, of course, has its own perspectives on the future of MMDS and ITFS. And the WCAI, while purporting to represent the MDS "industry," understandably approaches issues primarily from the standpoint of a handful of its largest members and contributors. The viability of future operations in the MDS/ITFS band are very much at stake for both those operators and the many smaller licensees who have been delivering independent MDS service to customers for decades under very trying conditions. The IMLC does not purport to speak for all of the independent MDS licensees, but it is comprised of a representative subset. We feel that it is important for the Commission to have input from this important segment of the industry, and we are offering these comments on the various options which the Commission is considering.

I. THE COALITION PROPOSAL

The MDS/ITFS band is situated in what has become prime real estate for every Third Generation mobile or wireless broadband application which engineers can conceive. Yet despite the apparent availability of almost 200 MHz of spectrum in this prime location, the band has been relatively unused or underused for the last 30 years. The cause may be traced to the historical balkanization of the band, both technically and regulatorily. The fact that MDS was

originally a common carrier service divorced licenseeship from day-to-day operations, creating a situation where licensees could not develop their markets themselves but had to rely on operators who all too often were underfunded and failed. Rule changes several years ago made it possible for licensees to take a hands-on approach to market development, but the historical industry pattern had become somewhat embedded. At the same time, potential operators had to gather sufficient bandwidth even to attempt a viable broadband service, which meant leasing capacity from ITFS licensees. While educational entities were usually eager to garner the revenue from leasing the "excess capacity" of their spectrum, the needs of commercial video or broadband operation were often not congruent with the optimal sites for educational receivers. And often the educators would not have sufficient funds to actually make effective educational use of the dedicated spectrum they retained. In addition, the interleaving of the ITFS and MMDS channels made it difficult to develop either flexible bandwidth applications or cellularized applications using large clusters of consolidated adjacent channels. Finally, both ITFS and MDS became encrusted over the years with increasingly useless periodic reports, forms and requirements which had some historical significance but have become unnecessary in the 21st century.

The Wireless Coalition Proposal goes a long way to untangling the regulatory snarl that has stymied ITFS/MDS from reaching its potential. The IMLC strongly supports the initiative to clear away regulatory underbrush, re-shuffle the channels to permit greater and more efficient use of the band, and generally transition to a simpler, more rational band plan where all licensees can get the most out of the spectrum. The framers of the Wireless Coalition Proposal are to be credited for producing a plan that puts us on the road to the new order.

As the Commission itself recognized in the NPRM, however, the Wireless Coalition

Proposal is not without rough spots and areas where improvement is possible. In many instances the proponents did not take into sufficient account the needs and interests of smaller independent licensees and operators, particularly in rural areas. In some instances, the procedures proposed by the Wireless Coalition are so cumbersome, so time-consuming and so needlessly complex as to invite years of squabbling before the FCC to resolve disputes. In other instances, naturally enough, the Wireless Coalition simply failed to account for situations which it had not considered. Our comments here are intended to suggest ways of ironing out the rough spots, eliminating unintended inequities, and generally improving what was an ambitious initial attempt at re-structuring these services. The result of the exercise has the potential to be nothing less than the creation of the ubiquitous mobile broadband service that the Commission's Chairman has called for. With that preface, we may turn to the specifics of the questions posed by the NPRM.

II. DE-INTERLEAVING

Initially, the IMLC wholeheartedly supports the Commission=s plan to de-interleave the ITFS and MDS band so as to arrange spectrum blocks in more functional clusters. The Wireless Coalition's plan generally calls for the lower band to be assigned to low power ITFS operations, the mid-band to be assigned to high power MDS and ITFS operations, and the upper band to low power MDS operations, with the lower power assignments permitting cellularized use and reduced interference to neighbors. This arrangement is said to be "technology-agnostic," a theological term which we understand to mean "technology-neutral." Unfortunately, the proposed arrangement is not actually technology-neutral. By arranging the band so that all of the lower band is allocated to ITFS and all of the upper band is allocated to MDS, FDD operations

are effectively precluded unless some of the ITFS spectrum is devoted to commercial use. The Commission should not predicate the entire band plan on the assumption that educators will not be using their spectrum for actual educational purposes. The presumption, rather, should be that the band will actually be used for its intended purpose, as it apparently is in a few areas of the country. In that event, the lower band would not be available for FDD operations and the upper band would not have sufficient frequency separation to permit such operations on the commercial spectrum. Even if one or more ITFS licensees were willing to temporarily lease excess capacity to a commercial operator, the operator could never have 100% certainty that FDD operations would be possible in the future; it would be dependent on the continuing good will, channel capacity and reasonableness of ITFS operators. It will be extremely difficult to secure the capital investment and financing necessary to fund FDD operations without long term security about the availability of the leased lower band spectrum. The Wireless Coalition's plan thus, perhaps inadvertently, disfavors FDD technology rather than being neutral.

We see no reason why low power ITFS operations must be bunched in the lower band while MDS operations are segregated in the higher. The simple solution appears to be to put one of the ITFS channel groups in the upper band and one of the MDS groups in the lower. This does no violence to the overall scheme but maintains the desired technology neutrality. Another second potential problem which neither the Commission nor the Wireless Coalition seem to have anticipated is the problem of how to re-assign spectrum to licensees in the band who are not collocated. The Wireless Coalition plan envisions putting high power MDS and ITFS licensees in immediate electromagnetic proximity to each other, yet it does not account for the fact that adjacent channel licensees operating at high power would almost certainly cause

interference to each other if they were not collocated. In that circumstance, who must change transmitter sites and who must pay for the reorientation of any receive sites?

Third, we have some concern that the Coalition plan wastes too much spectrum in guard bands which would be unnecessary if the high power operations were placed at either edge of the entire band. This problem seems to have been recognized by the Commission as well in its presentation of alternative band plans. *NPRM* at paras. 52-53. As we understand it, the sole reason for placing the high power operations in the middle of the band is to allow sufficient separation for FDD upstream and downstream operations. However, if seven 6MHz high power channels were placed at the lower end of the band, there would still be room for FDD operations at the lower and upper ends of the remaining low power band without the need for duplicative guard bands.

Finally, rather than compelling licensees to put one of their channels into the high power band (whether it is in the middle band or elsewhere), we would recommend that licensees be allowed to elect whether to put their channels in the high power band or not. If there is no need or desire to operate at a high power, each licensee should be permitted to operate at lower powers to facilitate cellular designs. Only those electing high power status would be so designated.

III. CREATION OF VOLUNTARY "COMMUNITIES OF INTEREST"

One plan the Commission should consider as an option available to all licensees is a plan originally proposed by the some of the present IMLC in 1997 when the Commission was considering how best to make two-way digital operation possible in these bands. Basically, the Commission should permit clusters of licensees in each market to form self-defined, market-

wide clusters. The concept is akin to that underpinning the European Union: all participants in the Union benefit by essentially erasing the internal borders among the member countries while retaining the individual sovereignty of each member state. Here a group of MDS/ITFS licensees, whether it be all licensees in a market or a subset of them, could elect to designate themselves as a community of interest. While each entity would retain its own license, within the cluster the group would have complete freedom to structure the usage of its channels however it wanted, limited only by the spectral mask and field-strength-at-the border requirements necessary to protect adjacent channel or adjacent market licensees. To facilitate these arrangements, the FCC would assign the participating licensees contiguous spectrum in the lower, middle and upper bands consistent with the amount of spectrum they would be contributing into the cluster. Moreover, there is no reason why there could not be more than one cluster in a market if different groups of licensees wanted to pursue different paths.

The benefit of the "free trade" arrangement is that within the cluster, the spectrum could be used with far more freedom than would be necessary if each individual licensee's spectrum had to be protected. It allows those licensees who wish to participate in a joint confederation to have contiguous spectrum, eliminating the need for unnecessary internal guard bands and making possible more uses of the available spectrum. It also gives individual licensees a real incentive to join in the plan and then work together without Commission involvement to set up a workable operational system. To the extent that ITFS entities join a cluster, this would be an ideal way for them to arrange for their transition costs to be born by the cluster as a whole if they could not otherwise pay them. Each cluster would designate a "Manager" who could be the single focal point for notices between the community of interest and adjacent communities of

interest or individual licensees. The internal governance of the community of interest would be entirely up to the community's members, who would have organizational articles akin to by-laws which would govern their management. This would simplify contacts and notices which under the present system can be quite unwieldy. Finally, having made the community of interest designation, the FCC can effectively step aside and let the licensees within the community put their joined spectrum to the most efficient use without having to seek individual station licenses for each facility within the territorial and spectrum boundaries of the community. As noted above, this feature is suggested as a purely voluntary option which licensees could take advantage of, not a mandate. The rules applicable to individual licensees would still apply, but, as with the European Union, the advantages of working together will stimulate licensees to join.

IV. REGULATORY UNDERBRUSH

The IMLC supports the Commission=s proposals to eliminate the various unnecessary and unhelpful filings which MDS licensees must make. These include:

A. The Form 430 Updates.

MDS licensees currently must file an annual report per Section 21.11 of the rules verifying that their current ownership and legal qualification information is unchanged. Since the information rarely changes, hundreds of licensees find themselves filing letters certifying that there has been no change, letters which seem to be unused by the Commission. This effort and expense is wholly unnecessary. We presume that the planned elimination of Form 430 in favor of Form 602 will eliminate the need for repeated "no change" filings. We do observe, however, that certain legal qualifications information called for by Form 430 (status of criminal and antitrust litigation) is not called for by Form 602. If that information is deemed important, it

could be requested on Form 602 on the same occasions that Form 602 must presently be filed or updated.

B. 21.911 Report.

As noted in the NPRM at para. 203, the annual filing of this report no longer serves a useful purpose. We believe it was originally intended to monitor the use of MDS channels for video usage versus data usage, but so far as we can determine, the Commission never reviews the data or uses it for any purpose. Moreover, as MDS/ITFS usage moves into a digital mode, it

will become difficult, if not impossible, to report what content is being transmitted over "channels" of fluctuating definition. This report imposes needless burden with no reward.

C. EEO Complaint Report.

On May 31 of each year, MDS licensees are required to file a report indicating whether any EEO complaints have been filed against them. (Sec. 21.307) In the twenty-five years the undersigned has practiced in the MDS field, he has seen only one report of an EEO complaint, and that complaint was subsequently dismissed. This report should be eliminated or, possibly, made a question on the annual EEO outreach reporting form which will be due on September 30 of each year. There is no need whatsoever for an additional report.

D. Content Control Statement.

Many MDS licensees file a "statement" annually pursuant to Section 21.920 indicating that they do not control the content of their transmissions and hence are not required to file an EEO report. It is unclear that such a statement is actually required, but the Commission should make clear which licensees must file EEO information and then consolidate that information on a single annual or biennial form.

E. Assignment and Transfer Consummation Period.

At paras. 166-169 of the *NPRM*, the Commission notes that the assignment and transfer application process could be streamlined, including expanding the consummation period to 180 days. In our experience, many, many transactions cannot be consummated in the 45 days presently allowed. This results in repeated requests to extend the consummation period which then require action by the Commission staff to give the extension. This is a waste of time for all concerned. Establishing a 180-day period consistent with the general ULS rule makes far more

sense.

F. Tariffs.

When MDS licensees operate as common carriers, it appears that they are still required to file and maintain federal tariffs since they have never been determined by the Commission to be non-dominant. (See § 21.903(b) and (c).) In the present market, it is, of course, nonsensical for carriers wholly lacking any market power to file tariffs while telecommunications giants do not. The Commission should make it clear that MDS common carriers are exempt from the tariff filing obligations of Title II of the Act.

V. THE PROTECTED SERVICE AREA OF INCUMBENT LICENSEES SHOULD BE CLEARLY DEFINED

The *NPRM* proposes to establish a 35-mile PSA or GSA around each main station. Para. 86. The *NPRM* leaves it unclear as to whether this 35-mile radius is defined by the main station's existing location or its location as of September 15, 1995. (The present PSAs became fixed as of that date, but licensees could change location within that 35-mile radius.) The IMLC supports establishing the PSA by reference to the present location (or presently proposed location, if an application is pending) since this will more accurately reflect present reality. New filers and incumbents alike can make interference analyses by reference to present site data rather than a legal fiction maintained since 1995.

The IMLC agrees that "splitting the football" is an appropriate way to handle overlapping PSAs. There is a real value in establishing clearly who has the rights to operate in which territories. Splitting the difference, while not ideal, provides a rough justice solution. While a few existing receive sites will inevitably fall on the wrong side of the demarcation point, the elimination of uncertainty will ultimately work to the benefit of all existing and potential receive

sites.

The Commission should also recognize voluntary agreements among parties to be protected in defining their protected service areas. It may be, for example, that licensees are presently each providing service to areas on the "wrong" side of the football divide. In that case, they might well agree that the overlapping PSAs could be divided in some way that better reflects either existing service patterns or terrain features, leaving each of them with "clear title" to the areas they serve or intend to serve. As long as all parties with rights to protection agree to such a redefinition of their protected areas, the Commission should formally recognize such PSAs.

VI. TRANSITION PLAN

As will be set forth below, a two-sided auction of encumbered MDS (and, possibly, ITFS) spectrum could be an opportunity to use auctions both to efficiently clear the band and to award the licenses to the companies who will put them to the best use. However, we do not believe that a two-sided auction will eliminate the need for a transition plan because there will still remain issues of timing and how to fit the reduced number of post-auction players into the puzzle. The Wireless Coalition proposed a complicated plan in which a "Proponent" of de-interleaving would trigger an intricate and complex process of vacating and relocating channels, issuing plans and counterplans, bickering over who pays for what – a process which is fine if all the parties agree (in which case the process is needless) but which would take years for the Commission and the courts to sort out if the parties do not agree. In addition, the initiation of the new channel structure in one market would also require adoption of the new structure in markets as far as 150 miles away, with the likelihood that conflicting daisy chains of plan Proponents

would become hopelessly ensnarled. That system is simply unworkable from a practical and structural standpoint. The Wireless Coalition proposal also calls for ITFS transition costs to be born by the Proponent, and for MDS transition costs to be born by the individual MDS licensee, whether the licensee agrees with the plan or not. Simply stated, in no other field of FCC endeavor does the Commission require one licensee to pay for costs imposed by the desire of another licensee to restructure its licenses. To the contrary, in the broadcast field the FCC has uniformly and consistently required the proponent of a change in channels by other licensees to pay for the entirety of the costs involved in the change. *Circleville, Ohio*, 8 FCC 2d 159 (1967); *Kenton and Bellefontaine, Ohio*, 3 FCC 2d 598 (1966). A similar principle applies to the PCS and 800 MHz transitions. The Wireless Coalition proposal therefore runs directly contrary to about 50 years of governing FCC precedent with no justification whatsoever for the deviation.

At the same time, the Wireless Coalition proposal would relieve ITFS licensees of all responsibility for transition costs. This too is inconsistent with the Commission's historical and unswerving treatment of noncommercial educational and public safety licensees. While such licensees are relieved of some filing and regulatory fees, the Commission has never placed the burden of paying for their facilities on other carriers or broadcasters in their markets. Such a requirement would almost certainly raise equal protection issues, and would also require some reasoned explanation as to why ITFS licensees have been singled out for free rides while all other noncommercial and public safety licensees must pay their own way by raising their own funds.

This simply underscores the primary flaw in the Wireless Coalition transition plan: that it puts in the hands of a single entity – sometimes not even an entity with a license in the affected

market – the power to dictate to all of the other licensees how their operations should be structured. The Commission has never delegated such power to private hands, and it should not

do so now. If the restructuring of the MDS/ITFS band is to occur in any sort of fair, orderly and prompt way, it should achieve the following goals:

1. It should be accomplished with simplicity and certainty. That means that licensees should all simply bear the burden of the transition costs themselves or by voluntary agreements with others. The Commission should not have to become involved in market-by-market disputes about who owes what to whom or whose transition plan is better than someone else's.

2. It should look toward a consistent, nationwide use of the band in relatively short order so that broadband access can be ubiquitously available. The timing of the transition should be set by the Commission, with some leeway to account for individual market vagaries.

3. It should not permit any one party to dictate a channel usage plan to other parties, nor should it permit any one party to obstruct the ability of other parties to move toward a more efficient usage of the spectrum.

4. It should ensure that the default situation (*i.e.*, the end result of the reorganization of channels in the absence of agreement otherwise) is plainly defined.

These principles can be achieved by adopting the following:

A. A piecemeal, random, market by market transition from the old band plan to the new one would eliminate at the outset any possibility that the ITFS/MDS band could become a source of ubiquitous wireless broadband service throughout the United States. But to say that transition should not be piecemeal is not to say that it must be "flash cut" either. The Commission recognized when it adopted the cellular rules that subjecting cellular carriers to state by state certification proceedings would take years and be counterproductive to a swift, nationwide implementation of the new and sorely needed service. The Commission therefore forbade any such proceedings and instead licensed cellular on the basis of 30-market groups from the largest to the smallest. This phased introduction of cellular in part had to do with the Commission's then far more cumbersome licensing process, but it also permitted cellular to be

implemented most quickly in the major markets that needed it most, permitting the carriers and manufacturers to develop equipment and network management tools that were then perfected and carried forward to the increasingly smaller markets. Similarly, in implementing the DTV transition, video description requirements for broadcasters and cable, and other transitions, the Commission has successfully recognized that major markets normally have the greatest need and the greatest ability to support new services; once demand and service are established in the big markets, the other markets fall naturally into line. Phasing in the transition on a schedule set by the Commission would permit the industry, equipment vendors, and other interested parties to prepare for the transition in an orderly way that can reasonably be met.

By the same token, we believe that there should be some degree of flexibility in the schedule to account for the vagaries of each individual market. We can envision that some markets would want to transition earlier than the date set by the Commission, and there is no reason why they should not be permitted to do so. There may be other markets where technical difficulties or cost issues would suggest that the transition be slightly delayed. Again, if the delay is no more than a year, that relief should be available. Because the transition must be market-wide, we believe that the decision to alter the date specified by the Commission should be made by a majority in interest of the channels in the market. That is, if MMDS and ITFS licensees representing more than half of the licensed spectrum in any market (defined by BTA)[1] elected to advance the date, the date could be advanced to the date they agree on. If a majority in

[1] For this purpose, an incumbent site-by-site licensee would be deemed to be part of any BTA where more than a third of its PSA/GSA is located. BTA licensees would be deemed to have voting power equivalent to their proportional share of vacant ITFS and MMDS spectrum.

interest elected to delay the date up to one year, they could do so. This process could be accomplished by establishing a date certain by which a transition date modification could be

adopted by the majority; in the absence of timely notification to the FCC by a majority in interest that such an election had been made, the general FCC-established date would govern.

B. All licensees should be responsible for their own transition costs. This straightforward rule makes sense from a number of perspectives. (1) The underlying premise of the re-structuring of the band is that it will benefit all licensees; that being the case, all licensees should share in the cost. (2) It will eliminate a huge source of contention among the parties as to the details of the costs of transition; everyone involved will simply try to effectuate the transition economically and reasonably. (3) It eliminates the necessity of making a "proponent" pay for other people's costs on the theory that a single proponent is the one mainly benefitting by the transition. Since the transition is FCC-imposed, there is no need to make a single proponent pay for everyone else's costs. (4) As noted above, there is no precedent for exempting educational licensees from costs that are otherwise normally born by licensees in the construction, operation and maintenance of radio facilities. That said, we believe that the costs born by ITFS licensees here would tend to be relatively small. If an ITFS licensee is providing wide area coverage to its schools, it could digitize its channels and continue to operate at high power from its present location. If it is leasing the lion's share of its spectrum to a commercial operator, it is likely that the commercial operator would happily bear the cost of the transition by voluntary agreement with the ITFS licensee. (5) This transition plan eliminates the incentives and the opportunities for greenmail by obstructionist licensees.

C. No licensee should have to give up protected service area. The Wireless Coalition proposal seemed to permit a plan proponent to require licensees to relocate in ways that would effectively reduce a licensee's PSA/GSA. The transition plan proposed here

maintains the integrity of the existing licenses by re-shuffling the channels but ensuring each licensee that it ends up with the same amount of territory and spectrum that it had at the beginning.

VII. AUCTION ISSUES

In our view, the best way of simplifying the presently tangled web of licenses quickly and fairly is the two-sided auction concept floated by the Commission in the *NPRM*. We have assumed for this purpose that only MDS spectrum would be available in such an auction, but if the Commission determines that ITFS spectrum can and should be made available by auction, it would be best to do that in a coordinated fashion with the MDS auction so that potential aggregators can assemble the largest quantity of spectrum in each market. Here is how we envision that the process might work:

The entire MDS band including licensed channels (plus the ITFS channel groups, if the FCC so determines) would be auctioned according to the present ITFS/MDS channel groups (A, B, C, D, E, F, G and H) and the BTAs. In the auction, existing incumbent MDS and ITFS licensees would bid with virtual dollars. If they elect to retain their licenses, they could simply outbid any other bidder for their channel block; in that case they would retain their existing license. If they permitted themselves to be outbid, they would receive the amount bid for their license and forfeit any further rights to their license. Thus, a bidder who truly desired a market could clear the band of all incumbents by simply bidding a high enough price. It would have no obligations to pay for anyone else's relocation costs or transition costs and would have unencumbered spectrum to work with.

The two-sided auction coupled with an efficient and timely transition would present an

opportunity to radically simplify the balkanized license structure which has complicated the ability of operators and licensees alike to implement their business plans. Presented with a fair and transparent market value established by auction for all of the licenses in the market, incumbent licensees would be able to realistically evaluate whether their own individualized plans for license use make sense economically. If they do not, the licensee would let itself be bought out; if they do, the licensee would have a very strong incentive to maximize the use of its license since it had just turned down market value for it. Even if less than all of the incumbents in a market were not bought out, an interested bidder could determine whether it had enough of a critical mass to proceed with the purchase of some significant subset of the spectrum in the market. The end result would be that the band would have a far more simplified ownership structure, and the remaining licensees would be entities that truly intend to put their licenses to the highest value. No one would have to worry about paying anyone else's transition costs since the auction winner and any remaining incumbents would pay for their own transitions. This disposition would also be fair. Incumbents who sold out in the auction could not complain since they would have voluntarily received fair value for their licenses. Incumbents who do not sell out are presumably serious operators who intend to use their spectrum productively. The market would thus work to clear the ITFS/MDS spectrum efficiently.

To make the auction work properly, several refinements are necessary. First, since each MTA would have both incumbent site-by-site licenses as well as geographic licenses, bids placed for each channel block in each BTA would have to specify bids for the incumbent license and/or the geographic BTA license. A bidder should be allowed, however, to indicate combinatorially that it would not be deemed the winning bidder on any channel block in any

market unless it was the high bidder for both the incumbent and the geographic license. This will permit bidders to acquire full unencumbered rights to the channel blocks in each MTA without the risk of ending up with useless bits and pieces.

Second, any geographic licensee whose license was acquired would be relieved of future obligations on FCC installment notes. Obviously, a licensee should not have to pay for a license of which it has been divested. Any amount owing by a by a BTA licensee on an installment note would first be paid to the Commission, with any remainder going to the BTA licensee.

Third, eligibility to acquire the licenses should be limited only by anti-trust constraints. A monopoly cable TV provider, for example, who acquired the spectrum for anti-competitive purposes, might violate the anti-trust laws but that situation would be sufficiently rare and egregious that the FCC rules do not need to guard against it. In general, the potential uses of this bans are so varied that no category of entity, whether it be cable company, CLEC, broadband ISP provider, or CMRS carrier should be excluded.

VIII. ONGOING OBLIGATIONS

The constant restructuring of the MDS/ITFS rules has led to a long-standing stasis in the industry. Neither equipment vendors, nor financing institutions, nor licensees and operators themselves, are willing to invest large amounts of capital or development costs in a service which is on the verge of changing dramatically. MDS has historically been an industry which is always about to happen, but which never quite makes it there. The presently proposed radical restructuring of the spectrum band and licensing methodology is the best prospect yet for realization of MDS's potential. But again, unfortunately, the industry must tread water until the new rules go into effect.

The Commission has wisely acknowledged this practical reality by granting a blanket extension of time to construct facilities with outstanding build-out deadlines. However, the Commission neglected to address the problem of continued operation of existing stations. It would be highly anomalous for the Commission to permit unconstructed stations to stay unconstructed pending the outcome of the rulemaking but to require licensed facilities to continue operations artificially during that same period. Because it would be unrealistic to hook up new subscribers to an MDS network which is likely to be re-vamped entirely upon adoption of the proposed rules, most licensees and operators have been forced to suspend any growth in subscribership and shelve marketing campaigns. In the not uncommon cases where large lessees (such as WorldCom or Nucentrix) have gone out of business or radically reduced operations, licensees have had to suspend operations altogether. Again, given the radical re-structuring which is expected next year, licensees cannot realistically sell service to new lessees under the existing regulatory framework. Licensees in this quandary should not be penalized.

The problem is that Section 21.303 of the rules requires licensees not to suspend operations for more than twelve months. Arguably, a licensee wanting to deploy an advanced system under the rules now under consideration would nonetheless have to continue providing service to at least some legacy subscribers or risk forfeiture under Section 21.303. It makes no sense to artificially compel the continuation of uneconomical and inefficient service simply to meet FCC rules. There is no comparable rule for PCS service. The Commission should simply therefore abolish Section 21.303 and waive its application for the period from March 2003 to the adoption of the Order resolving this rulemaking proceeding. Licensees will have their own strong financial incentives to make the best and most productive use of their licenses as soon as that becomes feasible. Instead of the heavy-handed and outmoded "command-and-control"

regulation embodied by 21.303, the Commission should employ the more modern regulatory model which has been made applicable to virtually every other area-wide service, such as LMDS: require licensees to provide substantial service by the end of their license terms, with safe harbor provisions establishing clear guidelines for what is deemed substantial.

One subject not touched on in the NPRM is whether or when MDS licensees could become CMRS providers. Under the new flexible use permitted for MDS/ITFS spectrum, licensees could conceivably use it in a way that would fall within the statutory definition of commercial mobile radio service. See 47 C.F.R. 20.3. Taking on that regulatory classification has certain legal consequences. For example, state regulators are divested by Section 332(c) of the Act from any authority to regulate CMRS rates; there is no such restriction on non-CMRS MDS rates. In addition, annual regulatory fees and other FCC rules are triggered by CMRS or non-CMRS status. Just as licensees must declare themselves common carriers or non-common carriers, it would be useful for them to declare themselves CMRS or non-CMRS. This self-categorization will help consumers and regulators alike to know what regulatory scheme applies at any given moment.[2]

IX. EXISTING LEASES

As a product of historical circumstance, the MDS/ITFS world is presently entangled in a web of lease agreements, many of which are for long terms. ITFS licensees have leased their excess capacity; MDS licensees have leased their capacities. In virtually all cases, these leases contemplate operation on certain channels under the model which prevailed in the industry for the last 25 years. Often the leases call for lease of a particular channel group or particular

[3]Of course, any such self-definition is subject to objective overruling if the actual facts of operation differ from the claimed regulatory status.

amount of spectrum. In many cases, the payment schedules in the leases are based upon video channel-type measures such as monthly subscribers. Under the de-interleaving plan, MDS licensees will be left in a position where the licensee will have less spectrum than it contracted to offer and at a different frequency than it originally had. MDS lessees will be getting a wholly different frequency and power than they contracted for. Moreover, the whole surrounding regulatory paradigm will have dramatically changed because the eligible uses of MDS and ITFS will have dramatically expanded.

In the absence of guidance from the FCC, the continued status of these contracts is likely to be the subject of enormous confusion and litigation. It could reasonably be argued that a contract for one frequency or one bandwidth is not the same as a contract for another, and the contract must therefore be rescinded. On the other hand, it could be argued that if comparable spectrum is substituted for the original spectrum, the parties should remain bound by the original contract. This issue is bound to spawn hundreds of lawsuits in hundreds of different jurisdictions around the country. All of the intended benefits of the restructuring proposed in this Docket will be lost if four or five years are spent in jurisdiction after jurisdiction determining whether leases from the old paradigm apply or not.

While the Commission normally avoids intruding into contractual relationships, it has not hesitated to require modification of contracts in appropriate circumstances. For example, in *Amendment of of Parts 1, 21 and 74 to Enable MDS and ITFS Licensees to Engage in Fixed Two-Way Transmissions*, 13 FCC Rcd 19112 (1998), *modified*, 14 FCC Rcd 12764 (1999) ("*Two-Way Order*"), the Commission adopted rules which significantly affected provisions common to ITFS leases. The Commission declared that certain types of provisions were either valid or invalid, and lessors and lessees conformed their leases to comply with the new requirements. The Commission should direct that MDS and ITFS lessors and lessees whose lease arrangements are materially impacted by the rules adopted in this proceeding must enter into good faith negotiations to conform their agreements to the framework of the new rules while maintaining as closely as possible the business relationship created by the existing leases. Such a process will minimize disruption to the entire lease structure under which the industry operates.

In addition, we feel that there is a need to facilitate operations by MDS and ITFS licensees where existing leases have terminated or will shortly be terminating. Typically, MDS and ITFS leases provide that the licensee leases equipment from the non-licensee operator with an option to buy it when the lease terminates. In the *Two-Way Order*, *supra*, at Para. 125, the Commission required that ITFS leases include a provision permitting the ITFS licensee to purchase the transmission equipment (or comparable equipment) in the event of lease termination. This precaution was intended to ensure that if a lessee defaults or simply ends the agreement, the licensee will be in a position to readily acquire the transmitting facilities so that service to a new customer can resume with a minimum of interruption. Unfortunately, the Commission failed to require this same protection for MDS licensees who are often similarly vulnerable. In addition, there is no automatic or expeditious method for enforcing these lease rights. Too often fly-by-night operators do just that, taking their equipment with them. This leaves both MDS and ITFS licensees scrambling to enforce their legal right to the equipment – a proposition which is invariably costly, time-consuming, and often fruitless as well, regardless of the legal rights involved. In order to preserve the ability of MDS and ITFS licensees to provide service after the termination of leases, the Commission should make clear that the *Turner*[3] principle applies to MDS as well as ITFS licensees and it should expressly mandate that lessees must facilitate the transfer of equipment and site leases to licensees in the event of termination.

[3]*Turner Independent School District*, 8 FCC Rcd. 3153, 3155 (1993). In *Turner*, the Commission stated its policy that ITFS leases should permit acquisition by the ITFS licensee of the transmission equipment in order to avoid interruption of service upon cessation of the lease.

X. CONCLUSION

The IMLC strongly supports the effort to move the MDS/ITFS spectrum to a new structural and regulatory paradigm that will both streamline regulation and promote the ability of licensees to put the spectrum to its best and most efficient use. The Comments provided above are offered in furtherance of those goals.

Respectfully submitted,

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